

Jan 08, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SALLIE CAROL LOPEZ,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:16-cv-03216-MKD

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 25, 26

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 25, 26. The parties consented to proceed before a magistrate judge. ECF No. 4. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff's motion (ECF No. 25) and grants Defendant's motion (ECF No. 26).

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - 1

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674

1 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
2 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
3 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
4 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
5 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
6 *Sanders*, 556 U.S. 396, 409-10 (2009).

7 **FIVE-STEP EVALUATION PROCESS**

8 A claimant must satisfy two conditions to be considered “disabled” within
9 the meaning of the Social Security Act. First, the claimant must be “unable to
10 engage in any substantial gainful activity by reason of any medically determinable
11 physical or mental impairment which can be expected to result in death or which
12 has lasted or can be expected to last for a continuous period of not less than twelve
13 months.” 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant’s
14 impairment must be “of such severity that he is not only unable to do his previous
15 work[,] but cannot, considering his age, education, and work experience, engage in
16 any other kind of substantial gainful work which exists in the national economy.”
17 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

18 The Commissioner has established a five-step sequential analysis to
19 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
20 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner

1 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);
2 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the
3 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
4 404.1520(b); 416.920(b).

5 If the claimant is not engaged in substantial gainful activity, the analysis
6 proceeds to step two. At this step, the Commissioner considers the severity of the
7 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
8 claimant suffers from "any impairment or combination of impairments which
9 significantly limits [his or her] physical or mental ability to do basic work
10 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
11 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
12 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
13 §§ 404.1520(c); 416.920(c).

14 At step three, the Commissioner compares the claimant's impairment to
15 severe impairments recognized by the Commissioner to be so severe as to preclude
16 a person from engaging in substantial gainful activity. 20 C.F.R. §§
17 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
18 severe than one of the enumerated impairments, the Commissioner must find the
19 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

1 If the severity of the claimant's impairment does not meet or exceed the
2 severity of the enumerated impairments, the Commissioner must pause to assess
3 the claimant's "residual functional capacity." Residual functional capacity (RFC),
4 defined generally as the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
6 404.1545(a)(1); 416.945(a)(1), is relevant to both the fourth and fifth steps of the
7 analysis.

8 At step four, the Commissioner considers whether, in view of the claimant's
9 RFC, the claimant is capable of performing work that he or she has performed in
10 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).
11 If the claimant is capable of performing past relevant work, the Commissioner
12 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).
13 If the claimant is incapable of performing such work, the analysis proceeds to step
14 five.

15 At step five, the Commissioner considers whether, in view of the claimant's
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
18 the Commissioner must also consider vocational factors such as the claimant's age,
19 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);
20 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the

1 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
2 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other
3 work, analysis concludes with a finding that the claimant is disabled and is
4 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

5 The claimant bears the burden of proof at steps one through four above.
6 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
7 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
8 capable of performing other work; and (2) such work “exists in significant
9 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2);
10 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

11 **ALJ’S FINDINGS**

12 Plaintiff previously filed an application for benefits, which was denied on
13 December 6, 2011. Tr. 126-28. Plaintiff protectively filed applications for Title II
14 disability insurance benefits and for Title XVI supplemental security income
15 benefits on December 3, 2012, alleging a disability onset date of March 30, 2011.
16 Tr. 231-43. The applications were denied initially, Tr. 129-43, and on
17 reconsideration, Tr. 148-64. Plaintiff appeared at a hearing before an
18 administrative law judge (ALJ) on January 12, 2015. Tr. 19-51. On February 20,
19 2015, the ALJ denied Plaintiff’s claim. Tr. 797-809.

1 At step one of the sequential evaluation analysis, the ALJ found Plaintiff has
2 engaged in substantial gainful activity since March 30, 2011, but that there has
3 been a continuous 12-month period during which the claimant did not engage in
4 substantial gainful activity. Tr. 800. At step two, the ALJ found Plaintiff has the
5 following severe impairments: degenerative disc disease, osteoarthritis, status post
6 right knee arthroscopy, asthma, obesity, affective disorder, and organic mental
7 disorder. Tr. 800. At step three, the ALJ found Plaintiff does not have an
8 impairment or combination of impairments that meets or medically equals the
9 severity of a listed impairment. Tr. 800. The ALJ then concluded that Plaintiff has
10 the RFC to perform light work with the following limitations:

11 She should never climb ladders, ropes or scaffolds. She can occasionally
12 climb ramps and stairs. She can occasionally stoop, kneel, crouch and
13 crawl. She can occasionally reach overhead. She can reach in all other
14 directions, and frequently handle, finger and feel. She can have occasional
15 exposure to temperature extremes, humidity, and vibration. She should
16 avoid all exposure to pulmonary irritants such as dust, fumes, odors, gases,
17 and poor ventilation. She can have occasional exposure to hazardous
18 working conditions such as proximity to unprotected heights and moving
19 machinery. She must work within a 5 minute walk of sanitary restroom
20 facilities. She is able to carry out both simple and familiar detailed tasks,
but may require a little extra time than most employees to learn and become
familiar with detailed tasks, but once learned, she should be able to perform
them with the same efficiency as others. She is able to adapt to a predictable
work routine with no more than occasional changes.

Tr. 803.

At step four, the ALJ found Plaintiff is able to perform past relevant work as a customer service representative, receptionist, office helper, and medical records coder/biller. Tr. 807. Alternatively, at step five, after considering the testimony of a vocational expert, the ALJ found there are jobs that exist in significant numbers in the national economy that Plaintiff can perform, such as mail clerk and storage facility rental clerk. Tr. 808. Thus, the ALJ concluded Plaintiff has not been under a disability since December 7, 2011, the day after the prior determination became administratively final. Tr. 809. On September 27, 2016, the Appeals Council denied review of the ALJ's decision, Tr. 1-7, making the ALJ's decision the Commissioner's final decision for purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying her disability insurance benefits under Title II and supplemental security income benefits under Title XVI of the Social Security Act. Plaintiff raises the following issues for review:

1. Whether the ALJ properly considered Plaintiff's substantial gainful activity at step one;
2. Whether the ALJ properly evaluated the medical opinion evidence; and
3. Whether the ALJ properly considered vocational grid rule 201.06.

ECF No. 25 at 5-18.

DISCUSSION

A. Substantial Gainful Activity

Plaintiff claims the ALJ erred at step one by improperly considering her time working as a waitress as substantial gainful activity. ECF No. 25 at 6-8. Plaintiff argues this work should be characterized as a trial work period. *Id.*

At step one of the sequential evaluation process, the ALJ considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i); 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the ALJ must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(b); 416.920(b). However, an individual who is entitled to disability insurance benefits is entitled to a trial work period. 20 C.F.R. § 404.1592(d). "The trial work period is a period during which [a claimant] may test [their] ability to work and still be considered disabled." 20 C.F.R. § 404.1592(a). The trial work period may last up to nine months. *Id.* The Commissioner may not consider work performed during the trial work period in determining whether disability has ended. *Id.* The trial work period begins with the month in which a claimant becomes entitled to benefits. 20 C.F.R. § 404.1592(e).

Plaintiff contends that the period of time she spent working as a waitress from November 2013 to June 2014 should be considered a trial work period. ECF

1 No. 25 at 6-8. Plaintiff argues the consequence of this position is two-fold: if the
2 Court finds that the ALJ erred in finding the work substantial gainful activity, then
3 (1) the ALJ should not have determined that Plaintiff was ineligible for benefits
4 during this period because her waitress work should not be considered substantial
5 gainful activity, and (2) Plaintiff's activities during the trial work period should not
6 otherwise be considered evidence of nondisability during that time frame. ECF
7 No. 25 at 6, 10-12.

8 The question of whether an individual is entitled to a trial work period
9 before the Commissioner has adjudged the individual to be entitled to benefits has
10 not been addressed by the Ninth Circuit. However, several other circuits have
11 concluded that the trial work period is only available to claimants who have
12 already been adjudicated disabled and are receiving benefits at the time of the trial
13 work period. *See Cieutat v. Bowen*, 824 F.2d 348, 358-59 (5th Cir. 1987); *Mullis*
14 *v. Bowen*, 861 F.2d 991, 993 (6th Cir. 1988)¹; *Wyatt v. Barnhart*, 349 F.3d 983,
15 985-96 (7th Cir. 2003); *see also Conley v. Bowen*, 859 F.2d 261, 262 (2d Cir.
16 1988).

17
18
19 ¹ *But see Parish v. Califano*, 42 F.2d 188, 193 (6th Cir. 1981) (recognizing trial
20 work period eligibility upon filing for benefits in cases of degenerative disease).

1 This interpretation is consistent with the regulation itself, which excludes the
2 trial work period from the consideration of whether a disability has ended, rather
3 than the initial consideration of whether a claimant is disabled. 20 C.F.R. §
4 404.1592(a). Furthermore, the regulation that establishes the trial work period is
5 contained within the subheading “Continuing or Stopping Disability.” 20 C.F.R.
6 §404, Subpart P. In light of the text and context of the regulation, the Court finds
7 Plaintiff is eligible for a trial work period only after becoming entitled to benefits
8 by being adjudged disabled within the meaning of the Social Security Act. Here,
9 because Plaintiff was not adjudged disabled and thus was not entitled to benefits at
10 the time of her employment as a waitress, Plaintiff is unable to characterize her
11 employment as a trial work period.

12 Plaintiff has not cited any controlling legal authority to support her
13 interpretation of the trial work period regulation.² Moreover, even if Plaintiff did

14 _____
15 ² Plaintiff cites to *Gatliff* for the premise that Plaintiff’s work was too brief to be
16 truly substantial gainful activity. *Gatliff v. Comm’r of Soc. Sec. Admin.*, 172 F.3d
17 690, 694 (9th Cir. 1999) (“[S]ubstantial gainful activity means more than merely
18 the ability to find a job and physically perform it; it also requires the ability to hold
19 the job for a significant period of time.”). The Court finds *Gatliff* sufficiently
20 distinguishable from this case. Mr. Gatliff was mentally incapable of holding

1 identify legal authority entitling her to a trial work period as early as her
2 application date, Plaintiff's choice to leave her job places her employment beyond
3 the scope of a trial work period intended to test a claimant's ability to work. *See*
4 20 C.F.R. § 404.1592(a). Plaintiff testified that she voluntarily resigned from her
5 waitress job in order to take a more highly-paid position at another location. Tr.
6 37-38. She further testified that the new position was eliminated before she was
7 able to begin the job. Tr. 38. This record does not show Plaintiff engaged in a trial
8 work period to test her ability to work. Rather, Plaintiff's lack of employment
9 following her time as a waitress was caused by factors other than Plaintiff's alleged
10 disability.

11 As Defendant notes, Plaintiff's waitress work may be more accurately
12 characterized as an unsuccessful work attempt. ECF No. 26 at 3. However,
13 Plaintiff's employment exceeds the six-month limit of an unsuccessful work
14 attempt. 20 C.F.R. § 404.1574(c); 20 C.F.R. § 416.974(c). Plaintiff fails to
15 demonstrate error in the ALJ's determination that her employment as a waitress for
16 approximately seven months constituted substantial gainful activity.

17 _____
18 employment for more than two months at a time. *Id.* at 692. Plaintiff testified she
19 was employed for eight months and resigned from the position in order to take a
20 higher-paid job elsewhere. Tr. 37-38.

1 **B. Medical Opinion Evidence**

2 Next, Plaintiff challenges the ALJ’s consideration of the medical opinions of
3 Dr. Drenguis, Dr. Dougherty, Dr. Peterson, Dr. Eisenhauer, Dr. Rubio, and Nurse
4 Morphet-Brown. ECF No. 25 at 9-18.

5 There are three types of physicians: “(1) those who treat the claimant
6 (treating physicians); (2) those who examine but do not treat the claimant
7 (examining physicians); and (3) those who neither examine nor treat the claimant
8 [but who review the claimant’s file] (nonexamining [or reviewing] physicians).”
9 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).
10 Generally, a treating physician’s opinion carries more weight than an examining
11 physician’s, and an examining physician’s opinion carries more weight than a
12 reviewing physician’s. *Id.* at 1202. “In addition, the regulations give more weight
13 to opinions that are explained than to those that are not, and to the opinions of
14 specialists concerning matters relating to their specialty over that of
15 nonspecialists.” *Id.* (citations omitted).

16 If a treating or examining physician’s opinion is uncontradicted, the ALJ
17 may reject it only by offering “clear and convincing reasons that are supported by
18 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
19 “However, the ALJ need not accept the opinion of any physician, including a
20 treating physician, if that opinion is brief, conclusory and inadequately supported

1 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
2 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
3 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
4 may only reject it by providing specific and legitimate reasons that are supported
5 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81
6 F.3d 821, 830-831 (9th Cir. 1995)).

7 *1. William Drenguis, M.D.*

8 Dr. Drenguis examined Plaintiff on April 7, 2013, Tr. 503-07, and opined
9 that Plaintiff is limited to standing/walking for three hours per day in an eight-hour
10 workday; limited to six hours of sitting in an eight-hour workday; has a maximum
11 lifting/carrying capacity of twenty pounds occasionally and ten pounds frequently;
12 may occasionally balance but should never climb, stoop, kneel, crouch, or crawl;
13 may frequently reach, handle, finger, or feel; and is limited working at heights but
14 has no limitations around heavy machinery, around extremes of temperature,
15 around chemicals, around dust, fumes, gases, or around excessive noises. Tr. 507.
16 The ALJ assigned this opinion significant weight; however, the ALJ assigned
17 lesser weight to Dr. Drenguis’ opinion that Plaintiff is limited to three hours of
18 standing/walking in an eight-hour workday. Dr. Drenguis’ opinion on Plaintiff’s
19 standing/walking limitation was contradicted by Dr. Bernardez-Fu, Tr. 72, and Dr.
20 Rubio, Tr. 103. Therefore, the ALJ needed to identify specific and legitimate

1 reasons to discredit this portion of Dr. Drenguis' opinion. *Bayliss*, 427 F.3d at
2 1216.

3 The ALJ rejected Dr. Drenguis' assessed limitation because it was
4 inconsistent with Plaintiff's activities. Tr. 806. An ALJ may discount a medical
5 source opinion to the extent it conflicts with the claimant's daily activities.
6 *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 601-02 (9th Cir. 1999).
7 Although Dr. Drenguis opined Plaintiff could only stand or walk for three hours in
8 an eight hour workday, Plaintiff reported shopping once or twice a week for half of
9 a day at a time, and spending entire days doing housework. Tr. 316-17.
10 Additionally, inconsistency with a claimant's work activities reflected in the record
11 is a factor to consider in giving weight to medical opinions. 20 C.F.R. §
12 404.1527(c)(4); 20 C.F.R. § 416.927(c)(4); *see also Deiman v. Colvin*, 2016 WL
13 1658603 (D. Ariz. Apr. 27, 2016). Plaintiff testified she was able to work 40 hours
14 per week as a waitress, which is classified as light work. Tr. 37, 41. The ALJ
15 found that Plaintiff engaged in a variety of household tasks and waitress work that
16 demonstrated a capacity for light work. Tr. 801, 806. The ALJ did not err when
17 he concluded that these activities are inconsistent with being limited to standing
18 and walking to three hours per day. This was a specific and legitimate reason to
19 discredit Dr. Drenguis' assessed limitation.

1 2. *Roland Dougherty, Ph.D.*

2 Dr. Dougherty examined Plaintiff on April 9, 2013, Tr. 508-19, and opined
3 Plaintiff “is likely to have the ability to perform detailed and complex tasks,”
4 “should be able to accept instructions from supervisors and interact with coworkers
5 and the public,” “may have some difficulty maintaining regular attendance in the
6 workplace,” and that Plaintiff’s depression may interfere with her ability to
7 complete a normal workday and workweek and her ability to tolerate the stress of a
8 work environment. Tr. 514. The ALJ assigned significant weight to this opinion,
9 but gave lesser weight to the portion of the opinion finding Plaintiff would have
10 difficulty completing a normal workday/workweek. Tr. 806. The discredited
11 portion of Dr. Dougherty’s opinion was contradicted by Dr. Eisenhauer, Tr. 74,
12 and Dr. Peterson, Tr. 102. Therefore, the ALJ needed to identify specific and
13 legitimate reasons to discredit this portion of Dr. Dougherty’s opinion. *Bayliss*,
14 427 F.3d at 1216.

15 The ALJ found Dr. Dougherty’s assessed limitation was not supported by
16 his own examination notes. Tr. 806. A medical opinion may be rejected by the
17 ALJ if it is conclusory, contains inconsistencies, or is inadequately supported.
18 *Bray*, 554 F.3d at 1228; *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002).
19 Moreover, a physician’s opinion may be rejected if it is unsupported by the
20 physician’s treatment notes. *See Connett v. Barnhart*, 340 F.3d 871, 875 (9th Cir.

2003) (affirming ALJ's rejection of physician's opinion as unsupported by physician's treatment notes). During the examination, Dr. Dougherty noted Plaintiff was neatly dressed and groomed for the appointment, reported her mood as okay, had an affect consistent with a positive mood, had no difficulty socializing, had good social skills, was pleasant and cooperative during the examination, and that her thinking was logical and goal directed. Tr. 511-13.

These observations do not support Dr. Dougherty's opinion that Plaintiff's depression is so severe that it will impact her ability to complete a workday or workweek or tolerate the stress of a work environment. Tr. 514. This was a specific and legitimate reason to discredit Dr. Dougherty's assessed limitation. Even if Plaintiff could identify error in the ALJ's rationale, the ALJ included in the RFC limitations that account for Plaintiff's subjective symptoms. Tr. 803, 806. Thus, the partial discrediting of Dr. Dougherty's opinion was inconsequential to the overall disability determination. *Molina*, 674 F.3d at 1115. Plaintiff fails to identify harmful error in the ALJ's finding.

3. Gerald Peterson, Ph.D. and Renee Eisenhauer, Ph.D.

Dr. Peterson and Dr. Eisenhauer both reviewed Plaintiff's medical record and opined Plaintiff has limitations in concentration and persistence. Tr. 73-75, 101-02, 105-07. The ALJ afforded significant weight to both opinions. Tr. 806.

1 Plaintiff challenges these opinions collectively, arguing the ALJ improperly
2 incorporated these opinions into the RFC. ECF No. 25 at 12-15.

3 “[T]he ALJ is responsible for translating and incorporating clinical findings
4 into a succinct RFC.” *Rounds v. Comm’r Soc. Sec. Admin.*, 807 F.3d 996, 1006
5 (9th Cir. 2015). “[A]n ALJ’s assessment of a claimant adequately captures
6 restrictions related to concentration, persistence, or pace where the assessment is
7 consistent with restrictions identified in the medical testimony.” *Stubbs-Danielson*
8 *v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008). To the extent the evidence could
9 be interpreted differently, it is the role of the ALJ to resolve conflicts and
10 ambiguity in the evidence. *See Morgan*, 169 F.3d at 599-600. Where evidence is
11 subject to more than one rational interpretation, the ALJ’s conclusion will be
12 upheld. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). The Court will
13 only disturb the ALJ’s findings if they are not supported by substantial evidence.
14 *Hill*, 698 F.3d at 1158.

15 Here, Dr. Peterson opined that when Plaintiff is experiencing pain, she may
16 have limitations in her concentration, persistence, and interaction with others. Tr.
17 101-02. Dr. Peterson also opined Plaintiff is able to “understand, recall, and
18 execute simple one and two step tasks,” and her symptoms “would limit her ability
19 to carry out more complex tasks.” Tr. 106. Dr. Eisenhauer similarly opined
20 Plaintiff is able to “understand, recall, and execute simple one and two step tasks,”

1 and although her symptoms will cause “some degree of intrusion” during the work
2 week, “overall claimant is able to persist as needed for the completion of work
3 tasks in an average work environment.” Tr. 74.

4 The ALJ incorporated these findings into the RFC by limiting Plaintiff to
5 “simple and familiar detailed tasks, but once learned, she should be able to perform
6 them with the same efficiency as others.” Tr. 803. Although not verbatim, this
7 portion of the RFC reflects the limitations assessed by Dr. Peterson and Dr.
8 Eisenhower. Plaintiff does not identify medical evidence that contradicts this
9 finding. ECF No. 25 at 12-14. That Plaintiff offers a different interpretation of the
10 evidence is not a sufficient reason to overturn the ALJ’s decision. *Burch*, 400 F.3d
11 at 679. The RFC formulated by the ALJ reflects the medical opinions and is
12 supported by substantial evidence. The ALJ did not err in his evaluation of Dr.
13 Peterson and Dr. Eisenhower’s opinions.

14 *4. Guillermo Rubio, M.D.*

15 Dr. Rubio reviewed Plaintiff’s medical records on June 5, 2013, Tr. 103-05,
16 and opined Plaintiff is able to lift ten pounds occasionally and ten pounds
17 frequently. Tr. 103. The ALJ assigned lesser weight to this opinion. Tr. 806. Dr.
18 Rubio’s exertional limitations were contradicted by Dr. Bernardez-Fu, Tr. 72, and
19 Dr. Drenguis, Tr. 507. Therefore, the ALJ needed to identify specific and
20

1 legitimate reasons to discredit this portion of Dr. Rubio's opinion. *Bayliss*, 427
2 F.3d at 1216.

3 The ALJ discredited Dr. Rubio's opinion because it was inconsistent with
4 Plaintiff's daily activities, which showed a capacity for light tasks. Tr. 806. An
5 ALJ may discount a medical source opinion to the extent it conflicts with the
6 claimant's daily activities. *Morgan*, 169 F.3d at 601-02. Although Dr. Rubio
7 opined Plaintiff could only lift up to ten pounds, Plaintiff self-reported being able
8 to lift twenty pounds in her daily activities. Tr. 319. Plaintiff was also able to
9 work 40 hours per week as a waitress, which the vocational expert classified as
10 light work. Tr. 37-38, 41. These activities are inconsistent with being limited to
11 lifting a maximum of ten pounds. This was a specific and legitimate reason to
12 discredit Dr. Rubio's assessed limitation.

13 5. *Mary Morphet-Brown, NP*

14 Nurse Morphet-Brown has been Plaintiff's treatment provider for
15 approximately ten years. Tr. 50. Nurse Morphet-Brown submitted a physical
16 function evaluation, opining that Plaintiff's asthma causes severe restrictions on
17 Plaintiff's ability to perform basic work activities and that Plaintiff is unable to
18 meet the demands of sedentary work. Tr. 598-600. The ALJ assigned this opinion
19 very little weight. Tr. 806.

1 The opinion of an acceptable medical source such as a physician or
2 psychologist is given more weight than that of an “other source.” 20 C.F.R. §§
3 404.1527 (2012); *Gomez v. Chater*, 74 F.3d 967, 970-71 (9th Cir. 1996). “Other
4 sources” include nurse practitioners, physicians’ assistants, therapists, teachers,
5 social workers, spouses and other non-medical sources. 20 C.F.R. §§ 404.1513(d)
6 (2013). However, the ALJ is required to “consider observations by non-medical
7 sources as to how an impairment affects a claimant’s ability to work.” *Sprague v.*
8 *Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987). Non-medical testimony can never
9 establish a diagnosis or disability absent corroborating competent medical
10 evidence. *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). An ALJ is
11 obligated to give reasons germane to “other source” testimony before discounting
12 it. *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). The ALJ provided several
13 reasons to discredit Nurse Morphet-Brown’s testimony.

14 First, the ALJ found Nurse Morphet-Brown’s assessed limitations were not
15 supported by the record. Tr. 806. Plaintiff assigns error to this analysis, but does
16 not argue the point with specificity. ECF No. 25 at 16-17. Therefore, the
17 argument is waived. *See Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998) (the
18 Court may not consider on appeal issues not “specifically and distinctly argued” in
19 the party’s opening brief); *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155,

1 1161 n.2 (9th Cir. 2008) (determining Court may decline to address on the merits
2 issues not argued with specificity).

3 Second, the ALJ found Nurse Morphet-Brown's opinion was not adequately
4 explained. Tr. 806. Factors relevant to evaluating any medical opinion include the
5 amount of relevant evidence that supports the opinion, the quality of the
6 explanation provided in the opinion, and the consistency of the medical opinion
7 with the record as a whole. 20 C.F.R. §§ 404.1527(c); 416.927(c); *Lingenfelter v.*
8 *Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007); *Orn v. Astrue*, 495 F.3d 625, 631 (9th
9 Cir. 2007). "A medical opinion may be rejected by the ALJ if it is conclusory,
10 contains inconsistencies, or is inadequately supported." *Bray*, 554 F.3d at 1228;
11 *Thomas*, 278 F.3d at 957. Although Plaintiff argues Nurse Morphet-Brown's
12 assessment was based on a ten-year treatment history, the record only contains
13 treatment notes from 2010 to 2013. ECF No. 25 at 18; Tr. 366-82; Tr. 528-610.
14 These treatment notes do not contain any assessed limitations, nor any explanation
15 of how Plaintiff's impairments cause the limitations Nurse Morphet-Brown later
16 opined. Nurse Morphet-Brown's assessment does refer to Plaintiff's diagnosis of
17 asthma, but a diagnosis alone cannot sustain a finding of disability. *Key v.*

18 *Heckler*, 754 F.2d 1545, 1549 (9th Cir. 1985). Nurse Morphet-Brown did not
19 explain how Plaintiff's diagnosis causes the level of impairment Nurse Morphet-

1 Brown assessed. This was a germane reason to discredit Nurse Morphet-Brown's
2 opinion.

3 Finally, the ALJ found Nurse Morphet-Brown's opinion was inconsistent
4 with Plaintiff's daily activities. Tr. 806. An ALJ may discount a medical source
5 opinion to the extent it conflicts with the claimant's daily activities. *Morgan*, 169
6 F.3d at 601-02. Nurse Morphet-Brown opined Plaintiff is unable to meet the
7 demands of sedentary work. Tr. 600. However, as discussed *supra*, Plaintiff's
8 daily activities are consistent with light work as evidenced by Plaintiff working as
9 a waitress for over seven months and other activities including shopping and
10 housework. This was a germane reason to discredit Nurse Morphet-Brown's
11 opinion.

12 For these reasons, the ALJ did not err in rejecting this opinion evidence.

13 **C. Vocational Grid Rules**

14 Plaintiff argues the ALJ erred in failing to find at step five that Plaintiff
15 disabled under Vocational Grid Rule 201.06.³ ECF No. 25 at 9-15. The ALJ
16 concluded, based on the RFC, that Plaintiff was able to perform past relevant work,

17 _____
18 ³ Plaintiff's briefing refers alternatively to Grid Rule 201.06 and 201.12. ECF No.
19 25 at 9. Because the Vocational Expert classified Plaintiff's past work as skilled,
20 semiskilled, and unskilled, Tr. 41, the Court refers to rule 201.06.

1 and therefore found her not disabled at step four of the sequential evaluation
2 process. Tr. 807. The ALJ then made an alternative finding at step five that
3 Plaintiff is capable of performing other work that exists in significant numbers in
4 the national economy, including mail clerk and storage facility rental clerk. Tr.
5 808.

6 Under Grid Rule 201.06, a claimant is disabled if they are at advanced age,
7 limited to sedentary work, and their skills from previous work experience are not
8 transferrable. 20 C.F.R. § 404, Appendix 2 to Subpart P. The ALJ determined
9 Plaintiff is capable of performing light work with additional limitations. Tr. 803.
10 Plaintiff's argument supporting a grid finding is premised on Plaintiff's claim that
11 the ALJ improperly considered the medical opinion evidence. However, as
12 discussed *supra*, the ALJ properly weighed the medical opinion evidence.
13 Therefore, the ALJ properly concluded Plaintiff is capable of performing light
14 work with additional limitations. Because Plaintiff is not limited to sedentary
15 work, Grid Rule 201.06 is inapplicable.

16 Furthermore, even if Plaintiff could establish error in the ALJ's analysis, the
17 error would be harmless because the ALJ's findings at step five were made in the
18 alternative. "Other work" considerations, including evaluations made under the
19 Vocational Grid Rules, are reserved for step five, only after the ALJ has
20 determined Plaintiff is not capable of performing past relevant work. 20 C.F.R. §§

1 404.1560, 416.960; 20 C.F.R. § 404, Appendix 2 to Subpart P. Because the ALJ
2 properly considered the medical evidence, the ALJ properly concluded at step four
3 that Plaintiff is capable of performing past relevant work. The ALJ's step five
4 findings were made in the alternative. Whether or not the ALJ should have
5 considered the Grid Rule 201.06 at step five is irrelevant to the disability
6 determination, because the ALJ concluded the analysis at step four.

7 For these reasons, the ALJ did not err in failing to consider whether Plaintiff
8 meets the requirements of Grid Rule 201.06.

9 CONCLUSION

10 After review, the Court finds that the ALJ's decision is supported by
11 substantial evidence and free of harmful legal error.

12 IT IS ORDERED:

- 13 1. Plaintiff's motion for summary judgment (ECF No. 25) is **DENIED**.
14 2. Defendant's motion for summary judgment (ECF No. 26) is **GRANTED**.

15 The District Court Executive is directed to file this Order, enter
16 **JUDGMENT FOR THE DEFENDANT**, provide copies to counsel, and **CLOSE**
17 **THE FILE**.

18 DATED January 8, 2018.

19 s/Mary K. Dimke

MARY K. DIMKE

20 UNITED STATES MAGISTRATE JUDGE